

A decorative graphic on the left side of the slide. It features a large, thick black bracket '[' and a thin yellow circle. The circle is partially obscured by a horizontal bar that has a yellow-to-white gradient. The title text is centered within this bar.

What You Need to Know About CAN-SPAM

June 8, 2004
Brown Bag Lunch

Co-sponsored by:
Santa Clara County Bar Association
and
Cyberspace Law Committee of California State Bar

[Agenda]

- Scope of Coverage
- What All Companies Need to do to Comply (CAN-SPAM doesn't just affect "spammers")
- Enforcement and Remedies
- FTC Regulation Update
- Q&A

[Scope of Coverage]

- Which e-mail messages are covered:
 - “Commercial electronic mail message” – any e-mail message whose primary purpose is the commercial advertisement or promotion of commercial product or service
 - Link to website or reference to entity in message may not be enough
 - Gray areas

[Scope of Coverage, cont.]


- Contrast with “transactional or relationship message”
 - Primary purpose is to facilitate, complete, confirm or provide information regarding a transaction previously agreed to by recipient
 - Not every e-mail to current customers
 - Some regulation

[Scope of Coverage, cont.]

- Who is affected by CAN-SPAM?
 - Initiators
 - spammers
 - “senders”
 - Companies whose products/services are promoted in certain messages if:
 - Knew or should have known;
 - Benefit economically; and
 - Didn’t try to prevent or report

[Scope of Coverage, cont.]

- Imputed liability to goods/services providers to certain violators if
 - Affiliate (unless sender held out as separate line/division), or
 - Actual knowledge and benefit economically
- Not “ISPs” for mere conveyance

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- What All Companies Need to do to Comply (CAN-SPAM doesn't just affect "spammers")

Under CAN-SPAM Commercial E-mails Must:

- Never include false or misleading content anywhere.
- “Clearly and conspicuously” state Sender name and valid physical return address. (If using a From: line abbreviation of corporate name, make sure email body identifies the Sender.)
- “Clearly and conspicuously” state that the e-mail is an advertisement or promotion (Except for opt-in lists).
- “Clearly and conspicuously” include opt-out instructions, including a thirty-day working link. Implement opt-outs within ten days. “Tier” opt-outs so long as “None at all” is an option.

[Some E-mail Best Practices:]

- Train employees to recognize “commercial e-mail” (or consider an over-inclusive approach).
- Develop templates for Company’s commercial e-mails.
- State intended purpose of e-mail and where the customer elected to receive the solicitation.
- Recognize that an Opt-Out does not bar non-commercial e-mails, letters, fax, or phone calls (though other laws apply!)

[E-Mail Agents]

- Develop templates for Agents who send e-mails on behalf of your company.
- Include your company's opt-out link on the Agent's e-mail templates,
- Remove opt-out addresses from list before transferring to Agent.
- Collaborate with Agents on best ways to share (and overcome reluctance to share) customer opt-out information (e.g software; encryption; third party bonded services.)

Databases & Lists

- Implement a Company data base of opt-out e-mail addresses.
- Opt-out databases for a division are acceptable if Company keeps divisions entirely separate.
- Scrub your list against the opt-out database!
- When obtaining an e-mail list, understand restrictions and get clear permission to use in the desired way.
- Don't forget that opt-in lists may be the most valuable.
- Perhaps risk is lowered by avoiding commercial e-mails to consumers (NOT a legal requirement, but ...)

[Compliance:]

- Update your Company's Privacy Policy! Make sure to comply! Train Employees!
- Have contracts and campaigns reviewed by lawyer
- Aim to include in contracts terms to protect company against liability (such as consents, representations, and indemnities) that) and to address CAN-SPAM requirements.
- Be aware of marketing organizations that provide updates and 'best practices.'
- Develop and implement a CAN-SPAM compliance plan (this can lower damages in event of lawsuit!

[Enforcement: Which Anti-Spam Law Applies?]

FEDERAL CAN-SPAM ACT OF 2003

- Signed into law Dec. 16, 2003, effective Jan. 1, 2004; enacted in reaction to California SB 186
- Supersedes any state statute that expressly regulates the use of electronic mail to send commercial messages
- Exempts from pre-emption any state statute (i) not specific to electronic mail or (ii) to the extent that it prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto
- Remaining effectiveness of California's SB 186?

[Who Can Enforce CAN-SPAM?]

- Federal Trade Commission (“FTC”)
- State Attorney Generals
- Internet Service Providers
- Other Federal Agencies
- No Private Right of Action but Authorizes Bounty Hunter Rights

[Whom Can CAN-SPAM Be Enforced Against?]

- Sender or Transmitter of Spam
- People or Entities Advertising Through Spam, Provided That They Have “Actual Knowledge” or “Consciously” Avoid Knowing Whether Sender or Transmitter is Violating the Act

[Remedies]

- Statutory or Liquidated Damage Awards in the Maximum Amounts of \$250.00 per Violation, \$2 Million for Non-Willful Acts, and \$6 Million for Conduct that is “Willful and Knowing” or that One or More “Aggravating Violations” are Present
- Injunctive Relief
- Criminal Penalties Punishable by a Fine or Up to Five Years’ Imprisonment, or Both
- Bounty Hunter Awards of at Least 20% of the Civil Penalty Collected Available to Any Person Who Identifies a Violation
- Possible Attorneys Fees

Cases Brought Under CAN-SPAM By the Government

- F.T.C. v. Phoenix Avatar, FTC File No. 042-3084, Civil Action No.: 04C 2897 (N.D. Ill. filed April 28, 2004).
- United States v. Lin, No. 04-80383 (E.D. Mich. filed April 23, 2004).
- F.T.C. v. Global Web Promotions Pty, FTC File No. 042-3086, Civil Action No.: 04C 3022 (N.D. Ill. filed April 28, 2004).

[Other Cases Brought Under CAN-SPAM by Private Parties]

- Hypertouch v. BVWebTies, No. C-04-00880 (N.D. Cal. Filed March 4, 2004).
- Yahoo!, Inc. v. Head, No. C04-00965 (N.D. Cal. Filed March 9, 2004).
- Earthlink, Inc. v. Does 1-75, No. 1-04CV-0667 (N.D. Ga. Filed March 9, 2004).
- Microsoft Corp. v. JDO Media, No. CV04-0516 (W.D. Wash. Filed March 9, 2004).
- America Online, Inc. v. Does 1-40, No. 04-260-A (E.D. Va. Filed March 9, 2004).
- America Online, Inc. v. Hawke, No. 259-A T9E (E.D. Va. Filed March 9, 2004).
- Microsoft Corp. v. Does 1-50, No. CV04-0516 (W.D. Wash. Filed March 9, 2004).

[Regulatory Update]

- FTC has authority to enact regulations implementing and clarifying CAN-SPAM Act
- FTC now in process of doing so
- Usually by notice of proposed rulemaking, comment period and adoption of final rules

[FTC's CAN -SPAM Activities]

- Sexually-explicit material
 - CAN-SPAM requires e-mails must contain notice
 - FTC rules describe notice requirements
 - "Sexually-Explicit" in subject line
 - Effective May 19, 2004

[FTC's CAN-SPAM Activities]

- NPRM re several other issues
 - Definition of "Primary Purpose"
 - Transactional or Relationship Messages
 - 10 day compliance period for "opt out" requests
 - Additional aggravated violation practices

[FTC's CAN-SPAM Activities]

- Questions need for additional regulations
 - Responsibility of participants in "send to a friend" e-mail promotions
 - Multiple senders of single e-mail messages
 - Valid physical postal address question
 - "From" line issue

[FTC's CAN-SPAM Activities]

- Seeks comments on reports to Congress
 - Do Not E-Mail Registry
 - Rewards for "bounty hunters"
 - Subject lines of commercial e-mails
 - Overall effectiveness of CAN-SPAM

[Cyberspace Law Committee]

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